IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 418 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SMITABEN D/O NATVARLAL KALIDAS

Versus

PATEL DIPAKKUMAR PARSHOTTAMDAS

Appearance:

NR SV RAJU FOR MR GOVIND V PATEL for Petitioner

MR NAGIN N GANDHI for Respondent No. 1

MR HL JANI, APP for Respondent No. 2

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 12/10/1999

C.A.V. JUDGEMENT

This Special Criminal Application is filed by Smitaben, wife of respondent No.1-Patel Dipakkumar Parsottamdas and mother of two minor children, namely Shivang and Ishan aged about 5 years and 2 years respectively and is arising out of an order dated

1-5-1998 passed by the Addl. Sessions Judge, Mehsana in Cri. Revn. Appln. No.89 of 1999 whereby he has rejected the Cri. Revn. Application filed by the present petitioner as not maintainable under Sec.397 of Cr.P.C. on the ground that the order dated 29-4-1999 passed by the learned Chief Judicial Magistrate in Cri. Misc. Appln.195 of 1999 is an interlocutory order.

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#. Petitioner and respondent No.1 are wife and husband respectively and out of their wedlock, they have got two sons, namely, Shivang aged about 5 years and Ishan aged about 2 years and at present, they are staying with the petitioner at the house of petitioner's father since 2-6-1997. There were some matrimonial disputes between the petitioner and the respondent No.1 and, therefore, respondent No.1 filed a petition under Sec.9 of the Hindu Marriage Act and thereafter a petition under the Guardian and Wards Act before the District and Sessions Court, Mehsana for taking custody of minor children which are pending. Thereafter, the respondent No.1 filed an application under Sec.97 of Cr.P.C. being Cri. Misc. Appln. No.195 of 1999 and obtained search warrant of minor Shivang. The petitioner approached the District and Sessions Court but could not get any remedy. Therefore, present Special Criminal Application is filed for quashing the impugned order of search warrant dated 29-4-1999 passed in Cri. Misc. Application No.195 of 1999 by the Chief Judicial Magistrate, Mehsana.

#. I have heard Mr.S.V.Raju, learned counsel for the petitioner, Mr.N.N.Gandhi, learned counsel for the respondent No.1 and Mr.H.L.Jani, learned Addl. Public Prosecutor for the respondent No.2-State.

#. Learned counsel for the petitioner has mainly argued that Cri. Misc. Application No.195 of 1999 filed by the present respondent No.1 does not fall within the ambit of Sec.97 of Cr. P.C. as the minor children are not wrongfully restrained by their mother, but they are with their mother since 2-6-1997 whereas Cri. Misc. Appln. No.195 of 1999 has been filed by the petitioner on 29-4-1999 and, therefore, said application has been filed by the present respondent No.1 after a period of 22 months in order to pressurise the petitioner. He has further argued that the respondent No.1-husband had also filed an application under Sec.25 of the Guardian and Wards Act, 1890 for the purpose of obtaining custody of minor children Shivang and Ishan on 23-3-1998 before the District and Sessions Court, Mehsana which has been numbered as Civil Misc. Appln. No.61 of 1998. He has

further argued that though the respondent No.1 has preferred above Civil Misc. Appln. No.61 of 1998 under Sec.25 of the Guardian and Wards Act for obtaining custody of minor children wherein Court has taken cognizance of the matter which is pending before the District and Sessions Judge, Mehsana, still, he has preferred Cri. Revn. Appn. No.195 of 1999 before the Chief Judicial Magistrate at Mehsana on 29-4-1999 by suppressing the material facts of having preferred Civil Misc. Appln. No.61 of 1998 before the District and Sessions Judge, Mehsana on 23-3-1998 with the prayer of same nature and, therefore, above order is required to be quashed and set aside only on that ground. He has further argued that looking to the relation between petitioner and minor children and also when she is having their custody since last 22 months, Court ought to have issued notice before passing any order for ascertaining the correctness of facts. Had a notice been issued by the Court, it would not have entertained the above application. According to him, age of the Shivang is 5 years and that of Ishan is 2 years and, therefore, if custody of these minor children is given to the respondent No.1-husband, then welfare of the children will be disturbed and it is the mother who is the proper guardian looking to the age of minor children. It is further argued that respondent No.1 has neither taken any care to maintain the minor children at any time nor even visited to see them after 2nd of June, 1997.

#. Learned counsel for the respondent No.1-husband, Mr.N.N.Gandhi has mainly argued that present petition is not tenable as it is filed under Sec.482 of Cr.P.C., 1973 and it is required to be dismissed only on that ground. According to him, search warrant issued by the learned Chief Judicial Magistrate under Sec.97 is with regard to passing of interlocutory order and not deciding anything on merits and, therefore, this petition would not lie under Sec.482 of Cr.P.C. He has also argued that petitioner had availed the alternative remedy of filing the revision application before the Court of Sessions which has been rejected by the learned Addl. Sessions Judge and, therefore also, present petition is not maintainable and deserves to be dismissed. He has further argued that Cri. Misc. Appln. No.195 of 1999 was filed by the respondent No.1 before the Chief Judicial Magistrate, Mehsana for search warrant under Sec.97 because the petitioner had wrongfully confined the minor Shivang and Ishan who are aged about 5 years and 2 years respectively and Court has only issued warrant under Sec.97 and no final order has been passed. Meanwhile, petitioner preferred Cri. Revn. Application

No.89 of 1999 before the Sessions Court at Mehsana against the order dated 29-4-1999 of Chief Judicial Magistrate which was rejected by the learned Addl. Sessions Judge by holding that said order is an interlocutory order and, therefore also, present petition is required to be rejected. According to him, Shivang was borne on 24th September, 1993 and he was studying in nursery class in Divine Child School situated at Ahmedabad-Mehsana Highway which is a well reputed English medium school and as his performance was good, he had to be put in the said School in June, 1999 and, therefore, it was absolutely necessary to file the above proceedings before the learned Chief Judicial Magistrate Court for the purpose of welfare of minor children.

#. First of all, I would like to deal with the maintainability of the present petition. Present petition has been filed by the petitioner under Sec.482 of Cr.P.C. and learned Addl. Sessions Judge has not decided the matter on merits, but rejected the same only on the ground of it being the interlocutory order. Learned counsel for the respondent No.1 has relied upon a case of Dharampal and others Vs. Smt. Ramshri and others reported in AIR 1993 S.C. 1361 more particularly towards para 4 wherein the Apex Court has held as under:

> "It is now well settle that the inherent powers under S.482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Hence the High court had clearly erred in entertaining the second revision at the instance of 1st respondent. On this short ground itself, the impugned order of the High Court can be set aside."

Whereas learned counsel for the petitioner has strongly argued that the above reported case has been overruled by the Apex Court in the case of Krishnan and another Vs. Krishnaveni and another reported in (1997) 4 SCC 241. In that reported case, the Apex Court has categorically in para 14 as under:

> "We hold that though the revision before the High court under sub-section (1) of Section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of the High Court under Section 483, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside

the order of the courts below."

I do not agree with the argument of the learned counsel for the petitioner that the case reported in AIR 1993 S.C. 1361 has been overruled by the Apex Court in the case reported in (1997) 4 S.C.C. 241. But the facts remain that while deciding the case reported in (1997) 4 SCC 241, Apex Court has taken into consideration the case reported in AIR 1993 S.C. 1361 along with other cases and the judgment upon which reliance was placed by the learned counsel for the petitioner is the last in line. So, in short, law has been laid down by the Apex Court after taking into consideration the case reported in AIR 1993 S.C. 1361. It is held by the Apex Court in (1997) 4 S.C.C. 241 that second revision before the High Court after dismissal of first one by the Court of sessions is barred under sec.397(3). However, inherent power of High Court is still available under Sec.482, but such inherent power must be exercised sparingly so as to avoid needless multiplicity of procedure leading to miscarriage of justice.

#. Learned counsel for the petitioner has also relied upon a case reported in (1997) 10 Supreme Court Cases 342 in the case Anjali Anil Rangari Vs. Anil Kripasagar Rangari and Others.

#. It is established from the record and proceedings that petitioner is the mother of two minor children aged about 5 years 2 years respectively and she is having their custody for more than 22 months and application under Sec.97 of the Cr.P.C. for obtaining search warrant has been filed by the respondent No.1 before the learned Chief Judicial Magistrate on 29-4-1999. It is also established from the record and proceedings that prior to that in the month of March, 1998, respondent No.1 had filed Civil Misc. Appln. No.61 of 1998 before the District Court at Mehsana for obtaining custody of the minor children under Sec.25 of the Guardian and Wards Act, 1890. It is to be noted that when the respondent No.1 had filed Cri. Misc. Appln. No.195 of 1999 before the learned Chief Judicial Magistrate, he has suppressed the material fact of having preferred the Civil Misc. Appln. No.61 of 1998 and obtained search warrant under Sec.97 of the Cr.P.C. If any new circumstance has arisen for immediate custody of the minor after having exhausted the remedy available under the Guardian and Wards Act, 1890, then he would have approached the same Court dealing with the matters under the Guardian and Wards Act and in that event, Court must have taken cognizance of it and would have passed appropriate order. Instead of

doing so, he has filed the Cri.Misc.Appln. No.195 of 1999 and obtained the search warrant by suppressing the material fact. It is nothing but misuse of the process of law by the respondent No.1. As far as welfare of the minor children is concerned, petitioner has averred in her petition that minor child Shivang aged about 5 years is studying in a well reputed English medium school at Ahmedabad and when proceedings under Sec.25 of the Guardian and Wards Act are pending before the learned District Judge at Mehsana, it is not advisable to say anything regarding the same at this stage.

##. Learned counsel for the petitioner has also relied upon a case reported in (1997) 10 SCC 342. It is held by the Apex Court at head note as under:

> Held, mother is also a natural guardian under S.6 of the Hindu Minority and Guardianship Act, 1956 - Hence custody of the children with the mother was neither illegal nor were the children under her wrongful confinement"

In view of the above judgment, custody of children with the mother is neither illegal and, therefore, learned Chief Judicial Magistrate ought to have restrained himself while issuing search warrant in the above numbered Cri. Misc. Appln. No.195 of 1999. It appears that respondent No.1-husband has suppressed the material fact before the Court below.

##. Looking to the facts and circumstances, when the petitioner-mother is having the custody of two minor children since 2nd of June, 1997 and also when the civil proceedings, namely Civil Misc. Appln. No.61 of 1998 filed by the respondent No.1-husband is pending in the court of District Court, Mehsana under Sec.25 of the Guardian and Wards Act for obtaining custody of the minor children, the order passed by the learned Chief Judicial Magistrate is required to be quashed and set aside with the observation that present judgment would not affect the proceedings under Sec.25 of the Guardian and Wards Act, 1890 pending before the District Court at Mehsana being Civil Misc. Appln. No.61 of 1998.

##. Trial court generally should not enlarge their jurisdiction in this type of cases when special remedy has been enacted in the Act itself and should avoid passing of this type of order unless special circumstances warrant to do so.

##. This Special Criminal Application is accordingly allowed. The impugned order dated 29-4-1999 passed by the learned Chief Judicial Magistrate, Mehsana is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

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